**IN THE HIGH COURT OF BOMBAY AT GOA**

**FIRST APPEALS NO.179/2001 AND 177/2002.**

**FIRST APPEAL NO. 179/01.**

M/s. Carl Estate Private Limited,
Mapusa, Goa, through its
Director Shri Oscar Jeronimo de Souza,
r/o Mapusa, Goa. ..... Appellant.

Versus

Dr. Jagdish J.N. Counte,
r/o Tonca, Caranzalem,
Tiswadi, Goa. .... Respondent.

Mr. E. Dias, Advocate for the Appellant.

Mr. V.A. Lawande, Advocate for the Respondent.

**FIRST APPEAL NO. 177/02.**

Dr. Jagdish J.N. Counto,
r/o Tiswadi, Goa. .... Appellant.

Versus

M/s. Carl Estate Private Limited,
through its Director,
Shri Oscar Jeronimo de Souza,
r/o Mapusa, Goa. .... Respondent.

Mr. V.A. Lawande, Advocate for the Appellant.

Mr. E. Dias, Advocate for the Respondent.

**CORAM: A.P. LAVANDE &**
**N.A. BRITTO, JJ.**

Date of reserving the Judgment: 22.02.2005.
Date of pronouncing the Judgment: 9.03.2005.

**J U D G M E N T: (PER BRITTO, J.)**

These appeals are filed by both the parties in Special Civil Suit No.45/99 against the Judgment/Decree dated 27.4.01 of the learned First Addl. Civil Judge, Senior Division, Mapusa.

2. The parties hereto are hereinafter referred to in the names as they appear in the cause title of the said Civil Suit.

3. The plaintiff and the defendant entered into a written agreement styled as an agreement for construction and sale, dated 13.4.96. By virtue of this agreement the plaintiff agreed to purchase from the defendant a flat admeasuring 88 sq.mts. For a price of Rs.5,50,000/-. A sum of Rs. 4,00,000/- was paid by the plaintiff to the defendant by cheque dated 13.4.96 by way of earnest money and the balance amount of Rs.1,50,000/- was to be paid at the time of delivery of possession of the said flat which was to be completed not later than twelve months from the date of the agreement.

4. However, the plaintiff got out of the said agreement. The entire

controversy in the suit is regarding clause 4 of the said agreement. In terms of clause 4 it was stipulated between the parties that in case the plaintiff decided to cancel the agreement or was unable to pay the balance amount, the plaintiff would give a written notice to the defendant informing his intention to cancel the agreement by notice of thirty days in advance. In the event of cancellation the defendant was to refund to the plaintiff the earnest money of Rs.4,00,000/- without interest on the date of expiry of thirty days of the notice and in the event of failure on the part of the defendant to return the earnest money on the expiry of 30th day of the notice, the defendant was to pay to the plaintiff from the day thereafter a daily fine of Rs.1000/- in addition to compound interest of 4% per month on the earnest money till the earnest money was paid in full.

5. The plaintiff even before giving time to the defendant to complete the said flat and in terms of clause 4 of the said agreement wrote a letter to the defendant, dated 27.11.96 and informed him that he had decided not to purchase the said flat due to personal reasons and requested him to treat the said letter as 30 days notice and to return the amount of Rs.4,00,000/-. The plaintiff also sent a reminder on 4.12.96.

6. The defendant, in the month of March, 1997 gave a post-dated cheque dated 13.4.97 for Rs.4,00,000/- which bounced. The defendant gave

another cheque for Rs.4,00,000/- on 13.5.97 which bounced again. Thereafter another cheque of Rs.2,00,000/- dated 30.7.07 given by the defendant also bounced. The defendant then gave two post-dated cheques of Rs.2,00,000/- each dated 14.10.97 and 10.11.97 which also bounced. The plaintiff therefore caused legal notices dated 18.10.97 and 14.11.97 served upon the defendant demanding the payment of the amount due on the said two cheques and since the defendant did not pay the amount as required on or about 17.2.97 the plaintiff filed complaints against the defendant-Oscar J. D'Souza under S.138 of the Negotiable Instruments Act, 1881. The plaintiff filed the suit on 5.4.99, and, on 24.11.99 filed compromise terms in the said criminal cases. By virtue of the said terms of compromise both the parties agreed that the amount due on the cheques would be paid in six instalments of Rs.75,000/- each and one instalment of Rs.50,000/-. The first instalment was made payable on 27.12.99 and thereafter the remaining instalments were to be paid every month. The parties agreed that both the criminal cases would be dismissed as withdrawn on full and final payment of Rs.5,00,000/-. The parties also agreed that the plaintiff shall have no claim in respect of the cheques dated 14.10.97 and 10.11.97 as regards criminal remedy (liability). The plaintiff's suit for recovery of the earnest money of Rs.4,00,000/-, penalty of Rs.8,20,000/- and compound interest of Rs.7,53,348/- as per clause 4 of the said agreement, was filed on 5.4.99

prior to the said agreement dated 24.11.99.

7. The defendant contested the suit, inter alia, stating that in view of the compromise, the cause of action for the suit did not survive an therefore the suit ought to be dismissed.

8. The learned Civil Judge S.D., came to the conclusion that once the plaintiff and the defendant had reached the settlement in the said criminal cases, it meant that there was renovation of the terms of agreement between them and therefore the plaintiff could not recovery anything more than what was agreed upon in the settlement entered into. The learned Civil Judge further held that the plaintiff was not entitled to recover anything more than Rs.5,00,000/- and since there was no provision made for the payment of interest in the said terms of compromise, the learned Civil Judge proceeded to award interest to the plaintiff at the rate of 18% from 24.11.99 until the defendant paid the entire amount of Rs.5,00,000/-, and, therefore proceeded to decree the suit partly. As far as the performance of the agreement dated 24.11.99 is concerned, there is again a dispute between the plaintiff and the defendant, the plaintiff contending that a sum of Rs.5,30,000/- only having been paid by the defendant while the defendant contending that over a sum of Rs.5,50,000/- has been received by the Plaintiff. We are also told that the criminal cases are

pending in a Court where presently there is no Presiding Officer.

9. Shri Dias, the learned Advocate of the defendant, has relied on Section 62 of the Indian Contract Act, 1872 and in tune with the findings of the learned Civil Judge S.D., has submitted that there was novation of contract in this case in that the first agreement dated 13.4.96 was replaced by agreement dated 24,11.99 filed in the said criminal cases and therefore the original agreement dated 13.4.96 need not be performed. Shri Dias has placed reliance on Illustration (b) below S.62 of the Indian Contract Act.

10. Section 62 deals with novation, rescission and alteration of contract and provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. Illustration (b) below S.62 of the Indian Contract Act, reads thus:-

> " (b) A owes B 10,000 rupees. A enters into an agreement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old. "

11. We are unable to accept the submission of Shri Dias. It is true that the plaintiff in his cross-examination admitted that the Director of the defendant had to make payment in terms of the compromise and further

admitted that under the said compromise terms both the cheques were covered. However, the plaintiff denied that once payment was made in the said criminal proceedings the defendant would not be liable to make to him any further payment. Admittedly, on the date the compromise was filed on 24.11.99, the Civil Suit between the parties was pending. Both the parties chose not to make any reference to the said Civil Suit in the terms of compromise dated 24.11.99. Not only that, by virtue of clause 5, both the parties expressly agreed that the plaintiff would not have any claim in respect of the said two cheques dated 14.10.97 and 10.11.97 as regards the criminal liability. The said terms of compromise dated 24.11.99 abundantly make clear that what was compromised between the plaintiff and the defendant was the criminal liability incurred by the defendant, in the said two criminal cases, the cheques issued by the defendant having been dishonoured. We are therefore unable to agree that there was any novation of the old agreement dated 13.4.96 by new agreement dated 24.11.99. In other words, the agreement dated 24.11.99 related to the bouncing of the said two cheques regarding which the defendant was liable for punishment under the Negotiable Instruments Act, 1881. The law permits the plaintiff to take out both civil and criminal proceedings, which in fact, can proceed simultaneously and both the remedies are independent of one another. The outcome of a criminal trial does not affect the result of a Civil Suit and likewise a decree passed in the civil suit does not affect the criminal

proceedings. Irrespective of the said compromise in the said criminal cases, the learned Civil Judge S.D. was not prevented from passing a decree in favour of the plaintiff , though any amount paid in the course of the criminal proceedings had to be taken note of or adjusted in the amount due and payable t under he decree.

12. Next, Shri Lawande, the learned Advocate of the defendant, has submitted that the parties had agreed for payment of compound interest at the rate of 4% per month and if that is the agreed rate of interest between the parties, there is no reason why the same should not be awarded in favour of the plaintiff. As far as the penalty of Rs.1000/- per day is concerned, Shri Lawande has submitted that the plaintiff would not insist on the same but would leave to the Court to award to the plaintiff a sum which is deemed reasonable. Shri Lawande has placed reliance on the case of ***Central Bank of India v. Ravindra and others [(2002) 1 S.C.C., 367]*** in support of his submission that the plaintiff ought to be granted interest on the principal sum adjudged as stated in S.34 of C.P.C. Relying on ***Surjit Kaur v. Naurata Singh and another [(2000) 7 S.C.C. 379]*** Shri Lawande has submitted that although the rate of interest agreed to be paid in case of default in returning the earnest money is rather high, the parties had chosen to agree to the same and therefore the Court must abide by the said agreement. Shri Lawande has also placed reliance on the case of ***Oil***

***& Natural Gas Corporation Ltd. v. Saw Pipes Ltd. [(2003) 5 S.C.C. 705]***

wherein the Supreme Court has stated that :-

> "(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.
>
> (2)If the terms are clear and unambiguous stipulating the liquidated damages in case of he breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.
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> (3) Section 74 is to be read along with Section 73 and, therefore in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.
>
> (4) In some contracts, it would

> be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation "

13. On the other hand, Shri Dias has submitted that the stipulation for the payment of penalty of Rs.1000/- per day as well as the payment of interest compounded monthly at the rate of 4% are unconscionable terms and therefore they be not enforced. Shri Dias has submitted that the defendant does not dispute that the principal amount of Rs.4,00,000/- was liable to be paid by the defendant to the plaintiff and in fact as on date, the defendant has paid to the plaintiff over Rs.5,30,000/-. Shri Dias has therefore submitted that the plaintiff be awarded interest of 6% which would be reasonable and which may be adjusted towards the actual amount paid to the plaintiff. Shri Dias has placed reliance on a decision of this Court in the case of ***Vinayakappa Suryabhanappa Dahenkar v. Dulichand Hariram Murarka (A.I.R. 1986 Bombay 193).*** This Court in para 6 of the Judgment, observed that :-

> " When parties to a transaction with open eyes fix a consideration which later on appears low and complete the

> transfer by execution and registration of a sale deed, on a proper stamp paper, it becomes difficult for the Courts to assume the duties of policing such transactions simply on the ground that the consideration appears to be on low side. With land-prices in cities spiralling high, every vendor regrets a sale of real estate made in the yester year. But this regret will not enable him to get the sale rescinded after repaying the consideration with interest. "

In para 7 this Court further stated thus :-

> " There was a time when the shield of 'caveat emptor' would protect the most unscrupulous in the market place – a time when he law, in granting parties unbridled latitude to make their own contracts, allowed exploitative and callous practices which shocked the conscience of both legislative bodies and the Courts. "

The Court then referred to the Supreme Court of U.S.A. in Scot v. United States wherein the U.S. Supreme Court had stated that :-

> " If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to .... "

14. This Court referred to the case of ***A. Schroeder Musci Publishing Co. Ltd. v. Macaulay [(1974) 3 All ER 616]*** wherein Lord Diplock had stated that :-

> " If one looks at the reasoning of 19th century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it, and upheld it if they though that it was not. "

This Court therefore proceeded to observe that :-

> " Relief against unconscionability is not, therefore, a new concept in the law of contract. The Chancellor's protection was given primarily to expectant heirs who had borrowed money on the strength of their inheritance at exorbitant rates of interest. But the Chancellor's protection was also given to others who were susceptible to exploitation or pressure including the needy, the ignorant and the sick. Certain whole classes of "Presumptive sillies" such as sailors, farmers and women were taken under the Chancellor's wing. Unconscionability has also been invoked in land law; but they frequently do no more than indicate

> the terms on which equitable and thus discretionary remedies will be granted. “

Finally this Court stated that:-

> “ An unconscionable contract is such an agreement as no sane man not setting under a delusion would make, and that no honest man would take advantage of. Mere pecuniary inadequacy of consideration will not generally make the terms of a contract seem too unfair for enforcement unless the degree of inadequacy is extreme. The inadequacy must be so extreme so as to call for interposition of equity, either offensively or defensively. “

15. In our view the stipulation in the agreement dated 13.4.96 that the defendant, in the event of failure to refund the earnest money after 30 days , had to pay a fine of Rs.1000/- per day in addition to interest at 60% (4% per month compounded) is not only unreasonable as well as unconscionable but it was fixed 'in terrorem' by way of penalty and therefore ought not to be given effect to.

16. We do not expect the plaintiff, as a medical man, to take advantage of the defendant to recover the said amounts of Rs.1,000/- per day and interest at the rate of 60% from the defendant.

17. The entire controversy between the parties is to be settled with reference to Section 74 of the Indian Contract Act, 1872 which reads as follows :-

> " **74. Compensation for breach of contract where penalty stipulated for –** When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
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> Explanation . - A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> Explanation . - ...
>
> Explanation.- .... "

18. Section 74 of the Contract Act has sought to eliminate the distinction between the stipulations provided for payment of liquidated damages and stipulations in the nature of penalty as were available under the English Common Law. Both the said stipulations have now been brought together under the purview of Section 74 of the Indian Contract

Act. Whether it is a case of liquidated damages or penalty, a party faced with the breach of contract, is now entitled to get only reasonable compensation, subject to the limit of the amount stipulated in the contract itself. It is not necessary now for a party claiming compensation to prove the extent of loss or damage actually suffered and obtain compensation on that basis and the section only provides for the grant of reasonable compensation. It has been contended on behalf of the defendant that the money was lent for a business transaction and therefore the plaintiff ought to be entitled to interest at least at the rate of 18%. We are unable to agree with the said submission. The case at hand is only a case of failure to return of earnest money of Rs.4,00,000/- by the defendant received from the plaintiff towards purchase of a flat. It is not the case of the Plaintiff that he has suffered any loss on the failure of the Defendant to return the money. In our view, payment of interest by the defendant at the rate of 10% will be more than adequate or reasonable compensation from 27.12.96 till 27.4.01 with further interest at the rate of 6% from 28.4.01 until payment. In other words, the Plaintiff would be entitled to recover Rs.4,00,000/- with interest as aforesaid. However, we hasten to add that any sum paid or to be paid to the plaintiff under the terms of compromise filed in the said two criminal cases, will have got to be adjusted towards the amount of the decree modified herein. In case the decretal amount works out to be short of the amount agreed to be paid or actually paid in

the said two criminal cases, then nothing shall be due and payable to the plaintiff. The plaintiff would be entitled to receive from the defendant, costs of the suit, throughout.

19. The Judgment/Decree of the learned Civil Judge, Senior Division, shall stand modified in the aforesaid terms and both the Appeals shall stand disposed of accordingly.

**A. P. LAVANDE, J.**

**N. A. BRITTO, J.**

**sl.**